

REMARKS

Claims 98-107 were pending when the present Office Action was mailed on June 30, 2009. In this response, claims 98, 99, and 102-107 have been amended to comply with requirements of form expressly set forth in the Office Action dated June 30, 2009 and not to overcome any prior art. Accordingly, applicants respectfully submit that the amendments comply with C.F.R. § 1.116 and should therefore be entered after final action and prior to appeal.

Applicants thank the Examiner for his careful review of the response and his agreement with the applicants' arguments to overcome the Dumoulin reference. In the Final Office Action dated June 30, 2009, rejections over claims 98-107 were maintained pending a properly filed Power of Attorney and appropriate Terminal Disclaimers. Applicants accordingly submit:

- (A) Revocation of Power of Attorney and New Power of Attorney, signed by Mr. Peter Buck, General Counsel to Calypso Medical Technologies, Inc., dated August 7, 2009;
- (B) Terminal Disclaimer over co-pending Application No. 09/877,498, signed by applicants' counsel, dated August 7, 2009; and
- (C) Terminal Disclaimer filed under C.F.R. § 1.321 over commonly assigned Application No. 10/438,550, signed by applicants' counsel, dated August 7, 2009.

Claims 98-107 were rejected under § 103 using the Krag reference, an application assigned to Calypso Medical Technologies, Inc. Accordingly, applicants herein file a Terminal Disclaimer over commonly assigned Application No. 10/438,550 solely for the purpose of removing Krag as a reference to expedite the issuance of this application and without any admission or estoppel.

Claims 98-107 were rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over co-pending Application

No. 09/877,498. Applicants herein file a Terminal Disclaimer solely for the purpose of expediting the issuance of this application and without any admission or estoppel.

In accordance with the foregoing, enclosed herewith are executed Terminal Disclaimers filed in accordance with C.F.R. §1.321(b) and (c) which disclaims the terminal portion of any patent issuing on the instant application that extends beyond the expiration of co-pending Application No. 09/877,498 and commonly assigned US Publication No. 2003/0192557. The applicants submit that these Terminal Disclaimers overcome all outstanding rejections and withdrawal of the rejections is respectfully requested.

Dayco/McKesson Disclosure

In accordance with the undersigned's current understanding of the obligations imposed by *Dayco Products, Inc. v. Total Containment, Inc.*, 329 F.3d 1358 (Fed. Cir. 2003) and *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*, 487 F.3d 897 (Fed. Cir. 2007), the file histories of the following applications may contain information material to one or more of the pending claims. In assessing the patentability of the pending claims, the Examiner is respectfully requested to review the file history of each of the listed applications, determine whether such applications have "similar subject matter" and, if so, consider each substantive Office Communication and Office Action, including each reference on which a rejection is based, and each paper submitted by applicant therein. If the Examiner requires any further information in this respect, please let the undersigned know.

- a. Application Serial No. 09/877,498, filed on June 8, 2001; Non-Final Office Action mailed August 7, 2009.
- b. Application Serial No. 10/743,531, filed November 15, 2003.
- c. Application Serial No. 10/721,491, filed November 25, 2003.

Applicants believe that all pending claims are allowable and a Notice of Allowance is respectfully requested. If the Examiner believes that a telephone conference would be of value in expediting the prosecution of this application, he is cordially invited to telephone the undersigned counsel at the number set out below.

Fees due with this response will be paid by an EFT Account (as shown on the accompanying fee transmittal). The Director is hereby authorized to charge Deposit Account No. 50-0665, under Order No. 341148004US2 from which the undersigned is authorized to draw.

Dated: August 25, 2009

Respectfully submitted,

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